

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

PROTHERA, INC., d/b/a SFI USA,

Case No. 3:18-cv-00410-MMD-CLB

16

**Plaintiff.**

## ORDER

ZHOU J. YF

## Defendant

## I. SUMMARY

Plaintiff Prothera, Inc., doing business as SFI USA, sued Defendant Zhou J. Ye for trademark infringement, breach of contract, and related causes of action, for pretending to be a doctor in order to purchase Plaintiff's nutraceuticals, and then selling them—without permission and at a profit—on Amazon's online marketplace. (ECF No. 1.) Before the Court is Plaintiff's motion for partial summary judgment on only its breach of contract claim ("Motion").<sup>1</sup> (ECF No. 43.) Because the Court is persuaded by the only argument Defendant raised in opposition to the Motion, that the liquidated damages clause in the contract between the parties upon which Plaintiff relies in its Motion is unenforceable—and as further explained below—the Court will deny the Motion.

## **II. BACKGROUND**

Notably, there are no factual disputes pertinent to the Motion. (ECF Nos. 43 at 3-7, 47 at 1-5, 51 at 2.) Defendant instead makes the single, and purely legal, argument that the Motion should be denied because the liquidated damages clause in the operative contract is unenforceable, and Plaintiff seeks to establish its damages in the Motion via that liquidated damages clause. (ECF No. 47 at 5-13.)

<sup>1</sup>Defendant filed a response (ECF No. 47), and Plaintiff filed a reply (ECF No. 51). Both parties filed declarations with exhibits in support of their briefing. (ECF Nos. 44, 48.)

1 Plaintiff seeks to sell its products only through healthcare providers. (ECF No. 51  
2 at 2.) Defendant is not a healthcare provider. (*Id.*) To get Plaintiff's products for resale,  
3 Defendant pretended to be a healthcare provider, specifically by finding healthcare  
4 providers' names and credentials on the internet, and using those assumed identities to  
5 enter into a contract with Plaintiff to resell Plaintiff's products. (*Id.*) More specifically, to  
6 obtain Plaintiff's products for unauthorized resale, Defendant executed the ProThera Inc.  
7 d/b/a SFI USA HCP Product Purchase Terms and Conditions (the "Agreement"). (*Id.*;  
8 see also ECF No. 47-1 (Agreement).) The Agreement prohibits advertising, listing,  
9 offering for sale, selling, or distributing Plaintiff's products online, including through  
10 Amazon. (ECF No. 51 at 2.) Nonetheless, Defendant did. (*Id.*)

11 The Agreement contains a liquidated damages clause. (*Id.*) It reads:

12 **Liquidated Damages.** HCP acknowledges that the Sections are  
13 necessary and proper in order to protect SFI's brand reputation and  
14 goodwill, and to preserve authorized health care practitioners' (including  
15 HCP's) ability to make a reasonable margin on Product sales. HCP agrees  
16 that if it violates the Sections, SFI will be damaged in an amount that will  
17 be difficult or impossible to ascertain. Accordingly, HCP agrees to pay  
18 liquidated damages to compensate SFI for damages resulting from HCP's  
19 breach of the Sections (the "Liquidated Damages"). The parties have made  
20 advance provision for Liquidated Damages to avoid controversy, delay and  
21 expense in the event of any breach of the Sections. Liquidated Damages  
22 shall be an amount equal to \$500.00 for each separate breach for each  
23 day of breach. Each breach with respect to a Product shall be considered a  
24 separate breach for the purposes of this Section. For example, if HCP is in  
25 breach with respect to three different Product for a period of 10 days, HCP  
26 will be deemed to have committed 30 breaches and be subject to  
27 Liquidated Damages of \$6,000.00. The Liquidated Damages are estimated  
28 based on the various damages that SFI expects to suffer upon any breach  
of the Sections, including lost sales; infringement of SFI's trademarks and  
other intellectual property; irreparable harm to SFI's business, customer  
relationships, goodwill and quality control procedures; and costs of  
investigating breaches. HCP agrees that the Liquidated Damages are not a  
penalty and are reasonably estimated in light of the anticipated or actual  
harm that would be caused by a breach and the difficulty of proving the  
amount of loss and otherwise providing an adequate remedy to SFI and  
other affected health care providers. HCP hereby waives any defense to  
SFI's right to obtain liquidated damages on the basis that actual damages  
are calculable or that the liquidated damages do not represent a  
reasonable determination of damages or otherwise constitute a penalty.

1 (ECF No. 47-1 at 3.) There is no dispute here that Defendant is “HCP,” and Plaintiff is  
2 “SFI,” as those terms are used in the liquidated damages clause.

3 As Plaintiff explains, the only dispute as to the Motion is about this liquidated  
4 damages clause. (ECF No. 51 at 2.) Plaintiff relies on the liquidated damages clause for  
5 the damages element of its *prima facie* breach of contract claim. (ECF No. 43 at 10-13.)  
6 Using this clause, Plaintiff calculated that Defendant breached the Agreement 300 times  
7 because Defendant made 300 unauthorized sales of Plaintiff’s products, and thus  
8 Plaintiff is entitled to \$150,000 in damages, or \$500 per breach multiplied by the 300  
9 breaches. (*Id.* at 12-13.) As noted, Defendant counters that Plaintiff has not shown it is  
10 entitled to summary judgment because its breach of contract claim depends in part on  
11 the liquidated damages clause, which Defendant argues is unenforceable. (ECF No. 47.)

12 **III. LEGAL STANDARD**

13 “The purpose of summary judgment is to avoid unnecessary trials when there is  
14 no dispute as to the facts before the court.” *Nw. Motorcycle Ass’n v. U.S. Dep’t of Agric.*,  
15 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is appropriate when the  
16 pleadings, the discovery and disclosure materials on file, and any affidavits “show that  
17 there is no genuine issue as to any material fact and that the moving party is entitled to a  
18 judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An  
19 issue is “genuine” if there is a sufficient evidentiary basis on which a reasonable fact-  
20 finder could find for the nonmoving party and a dispute is “material” if it could affect the  
21 outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.  
22 242, 248 (1986). Where reasonable minds could differ on the material facts at issue,  
23 however, summary judgment is not appropriate. See *id.* at 250-51. “The amount of  
24 evidence necessary to raise a genuine issue of material fact is enough ‘to require a jury  
25 or judge to resolve the parties’ differing versions of the truth at trial.’” *Aydin Corp. v. Loral*  
26 *Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (*quoting First Nat’l Bank v. Cities Serv. Co.*, 391  
27 U.S. 253, 288-89 (1968)). In evaluating a summary judgment motion, a court views all  
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1 facts and draws all inferences in the light most favorable to the nonmoving party. See  
2 *Kaiser Cement Corp. v. Fishbach & Moore, Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986).

3 The moving party bears the burden of showing that there are no genuine issues  
4 of material fact. See *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 883 (9th Cir. 1982).  
5 Once the moving party satisfies Rule 56's requirements, the burden shifts to the party  
6 resisting the motion to "set forth specific facts showing that there is a genuine issue for  
7 trial." *Anderson*, 477 U.S. at 256. The nonmoving party "may not rely on denials in the  
8 pleadings but must produce specific evidence, through affidavits or admissible discovery  
9 material, to show that the dispute exists," *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404,  
10 1409 (9th Cir. 1991), and "must do more than simply show that there is some  
11 metaphysical doubt as to the material facts." *Orr v. Bank of Am., NT & SA*, 285 F.3d 764,  
12 783 (9th Cir. 2002) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.  
13 574, 586 (1986)). "The mere existence of a scintilla of evidence in support of the  
14 plaintiff's position will be insufficient." *Anderson*, 477 U.S. at 252.

15 **IV. DISCUSSION**

16 Defendant argues the liquidated damages clause in the Agreement is  
17 unenforceable because it imposes a penalty for breach that does not reasonably  
18 approximate the actual damages Plaintiff will suffer in the event of breach—nor did it  
19 here. (ECF No. 47 at 7.) Plaintiff counters that liquidated damages clauses are  
20 presumed valid in Nevada, and the clause is enforceable as written despite Defendant's  
21 contrary interpretation, which Plaintiff argues is unreasonable. (ECF No. 51 at 5-8.) The  
22 Court agrees with Defendant. The Court will first discuss the governing law, and then  
23 analyze the liquidated damages clause in the context of the parties' arguments.

24 To start, "[a] plaintiff in a breach of contract action must 'show (1) the existence of  
25 a valid contract, (2) a breach by the defendant, and (3) damage as a result of the  
26 breach.'" *Brown v. Kinross Gold U.S.A., Inc.*, 531 F. Supp. 2d 1234, 1240 (D. Nev. 2008)

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1 (quoting *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 920-21 (D. Nev. 2006)).<sup>2</sup> The  
2 parties' arguments about the liquidated damages clause are situated within the damages  
3 element of Plaintiff's breach of contract claim, as Plaintiff moved for summary judgment  
4 on its breach of contract claim only. (ECF Nos. 43, 47.)

5 Next, the parties' arguments about the liquidated damages clause require the  
6 Court to interpret that clause in light of the Agreement. Interpretation of a contract is a  
7 question of law. See *Shelton v. Shelton*, 78 P.3d 507, 510 (Nev. 2003).<sup>3</sup> "A basic rule of  
8 contract interpretation is that '[e]very word must be given effect if at all possible.'" *Musser*  
9 *v. Bank of Am.*, 964 P.2d 51, 54 (Nev. 1998) (alteration in original) (quoting *Royal Indem.*  
10 *Co. v. Special Serv. Supply Co.*, 413 P.2d 500, 502 (Nev. 1966)). Additionally, when  
11 construing a contract, a court should consider the contract as a whole and "should not  
12 interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 579  
13 P.2d 174, 176 (Nev. 1978). Under contract law generally, when a term is unambiguous,  
14 a court must construe it from the language contained within it. See *Chwialkowski v.*  
15 *Sachs*, 834 P.2d 405, 406 (Nev. 1992). A contract is unambiguous if it is not susceptible  
16 to more than one reasonable interpretation. See *Margrave v. Dermody Props.*, 878 P.2d  
17 291, 293 (Nev. 1994). "The usual rule of interpretation of contracts is to read provisions  
18 so that they harmonize with each other, not contradict each other. That task of

<sup>20</sup> Some courts characterize a breach of contract claim under Nevada law as  
<sup>21</sup> having four elements. See, e.g., *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*,  
<sup>22</sup> 386 P.3d 982 (Table), 2016 WL 6837851, at \*1 (Nev. 2016) (“there are four elements to  
<sup>23</sup> a claim for breach of contract in Nevada[:] ‘(1) formation of a valid contract; (2)  
<sup>24</sup> performance or excuse of performance by plaintiff; (3) material breach by the defendant;  
<sup>25</sup> and (4) damages’”) (quoting *Laguerre v. Nev. Sys. of Higher Educ.*, 837 F. Supp. 2d  
1176, 1180 (D. Nev. 2011)). In this case, Plaintiff characterized it as having three  
elements. (ECF No. 43 at 8.) Regardless, to the extent there is a fourth element, it is  
immaterial here—for two reasons. First, the parties’ dispute centers on the damages  
prong, which is present in either the three or four element formulation. Second, there is  
no dispute here that Plaintiff performed its obligations under the Agreement.

26       <sup>3</sup>This makes the parties' arguments as to whether the liquidated damages clause  
27 is enforceable suitable for resolution by the Court at summary judgment. In addition, and  
28 separately, the Court notes neither party disputes that Nevada law governs the Court's  
analysis.

1 construction is for the court.” *Peterson v. Minidoka Cty. Sch. Dist.* No. 331, 118 F.3d  
 2 1351, 1359 (9th Cir.), amended by 132 F.3d 1258 (9th Cir. 1997).

3 But most importantly here, whether the liquidated damages clause is enforceable  
 4 turns on whether it is a penalty. Liquidated damages provisions are presumed valid in  
 5 Nevada. See *Khan v. Bakhsh*, 306 P.3d 411, 414 (Nev. 2013). Their purpose is to “serve  
 6 as a good-faith effort to fix the amount of damages when contractual damages are  
 7 uncertain or immeasurable.” *Id.* (citation omitted). To successfully argue a liquidated  
 8 damages provision is unenforceable, the party challenging its application must establish  
 9 that it amounts to a penalty. See *Haromy v. Sawyer*, 654 P.2d 1022, 1023 (Nev. 1982).  
 10 “In order to prove a liquidated damage clause constitutes a penalty, the challenging  
 11 party must persuade the court that the liquidated damages are disproportionate to the  
 12 actual damages sustained by the injured party.” *Id.* (citation omitted). The “distinction  
 13 between a penalty and liquidated damages is that a penalty is for the purpose of  
 14 securing performance, while liquidated damages is the sum to be paid in the event of  
 15 non-performance.” *Mason v. Fakhimi*, 865 P.2d 333, 335 (1993) (citation omitted).

16 In the Agreement, Plaintiff is entitled to liquidated damages if the other party  
 17 (here, Defendant) breaches any of the Sections. (ECF No. 47-1 at 3, § 11.) The Sections  
 18 are elsewhere defined as sections 2, 5, 6, 7, 8, 9, and 13 of the Agreement. (*Id.* at § 10.)  
 19 Section 2 requires Defendant to represent that he would only purchase Plaintiff’s  
 20 products to resell to patients under his direct professional care,<sup>4</sup> and that Defendant  
 21 would not sell them on the internet. (*Id.* at 2 § 2.) Section 5 restricts Defendant to only  
 22 selling Plaintiff’s products to his patients for their personal use, in reasonable quantities.  
 23 (*Id.* at § 5.) Section 6 prohibits Defendant from reselling Plaintiff’s products online without  
 24 first getting Plaintiff’s written permission, specifically including on Amazon, and from  
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26                  <sup>4</sup>Of course, all the references to patients here do not really apply to these  
 27 circumstances, because Defendant is not a healthcare provider. But the fact that  
 28 Defendant clearly breached many provisions of the Agreement is not particularly relevant  
                       to the parties’ arguments, so the Court will not repeatedly mention the many ways in  
                       which Defendant breached the Agreement in reselling Plaintiff’s products on Amazon.

1 advertising online, though resale on certain online dispensaries is permitted. (*Id.* at § 6.)  
2 Section 6 also specifically prohibits certain acts, stating that Defendant: “shall not  
3 advertise, list, offer for sale, sell or distribute” Plaintiff’s products online. (*Id.*) Section 7  
4 prohibits resale to other resellers. (*Id.* at § 7.) Section 8 provides that Defendant may  
5 only market Plaintiff’s products at Defendant’s physical place of business, subject to  
6 certain further restrictions. (*Id.* at 2-3, § 8.) Section 9 imposes certain quality assurance  
7 obligations on Defendant, and requires that he immediately report any adverse events to  
8 Plaintiff. (*Id.* at 3, § 9.) Section 13 specifies that Plaintiff continues to own its intellectual  
9 property, and gives Defendant a license to use that intellectual property to sell and  
10 market Plaintiff’s products. (*Id.* at 3-4, § 13.) Thus, violation of any of these sections,  
11 including engaging in any of the acts they prohibit, or failing to comply with any of the  
12 obligations they impose, entitles Plaintiff to liquidated damages.

13 As Plaintiff repeatedly emphasizes in its briefing (ECF No. 43 at 11, 51 at 7-8),  
14 much of the liquidated damages clause is devoted to explaining why it should not be  
15 construed as a penalty. (ECF No. 47-1 at 3, § 11.) But the key portion, which actually  
16 specifies how liquidated damages must be calculated, provides:

17 Liquidated Damages shall be an amount equal to \$500.00 for each  
18 separate breach for each day of breach. Each breach with respect to a  
19 Product shall be considered a separate breach for the purposes of this  
20 Section. For example, if HCP is in breach with respect to three different  
Product for a period of 10 days, HCP will be deemed to have committed 30  
breaches and be subject to Liquidated Damages of \$6,000.00.

21 (*Id.*) Product is elsewhere defined as any of Plaintiff’s products that Defendant  
22 purchases. (*Id.* at 2.) Thus, reading the liquidated damages provision in light of the rest  
23 of the Agreement, Defendant must pay Plaintiff \$500 for each and every breach of  
24 sections 2, 5, 6, 7, 8, 9, and 13 of the Agreement, per day that Plaintiff is in breach.

25 As Defendant argues, calculating the amount Defendant owes Plaintiff in line with  
26 the plain meaning of this liquidated damages provision leads to staggering liability—  
27 much more than the \$150,000 Plaintiff seeks here. (ECF No. 47 at 8-10.) Plaintiff  
28 calculated the \$150,000 it seeks using a spreadsheet that showed Defendant’s actual

1 sales, and then multiplied those sales by \$500. (ECF No. 43 at 12-13, 51 at 6.) But this  
2 approach does not follow from the liquidated damages clause, or even from Plaintiff's  
3 own argument. Immediately before laying out this calculation, Plaintiff correctly argues  
4 that "the liquidated damages clause is triggered by any breaches of sections 2, 5, 6, 7, 8,  
5 9, or 13" of the agreement. (ECF No. 42 at 12.) Thus, breach cannot be limited merely to  
6 sales, as those sections prohibit many acts and omissions beyond sales. And in this  
7 case, there is no dispute that Defendant committed myriad breaches—many more than  
8 the 300 sales Plaintiff seeks to hold him liable for. Plaintiff's calculation of damages  
9 therefore does not align with the language of the Agreement.

10 There are also other reasons why Plaintiff's calculation is incorrect given the  
11 terms of the Agreement. First, Plaintiff's calculation does not account for the 'each day of  
12 breach' concept. (ECF No. 47-1 at 3, § 11.) Construing only a sale as a breach means  
13 you can only have one breach per product. But the Agreement must have intended to  
14 treat more than just sales as a breach, because, logically, it is unlikely you could have a  
15 sale of Plaintiff's product across multiple days.<sup>5</sup> The 'each day of breach' concept  
16 appears more likely an attempt to capture the "advertise, list, offer for sale" concepts that  
17 are also prohibited by Section 6. (*Id.* at 2, § 6.) Thus, limiting breach to individual sales,  
18 without also going after the advertising, listing, and offering also prohibited by the  
19 Agreement does not align with the language of the Agreement. Second, Plaintiff's  
20 calculation does not align with the example offered in the liquidated damages provision,  
21 which expressly relies on the 'each day of breach' concept. (ECF No. 47-1 at 3, § 11.)  
22 The example assumes breach as to three different products over 10 days, and arrives at  
23 30 breaches. (*Id.*) If Plaintiff used the same formula to calculate Defendant's damages  
24 liability here, it would have arrived at a much higher number than it did in its Motion.  
25 Third, Plaintiff's calculation does not account for the 'each breach with respect to a  
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27 <sup>5</sup>Installment payments and financing are of course common for many types of  
28 sales, but there is no evidence before the Court this is how end customers pay for  
Plaintiff's products, which are, for example, bottles of Vitamin C tablets.

1 Product will be considered a separate breach' concept. That concept contemplates  
 2 liability for at least products offered for sale, but not actually sold—but Plaintiff's  
 3 calculation does not.

4 To the contrary, Defendant's absurd<sup>6</sup> argument he should be on the hook for  
 5 approximately \$2.8 million instead of the \$150,000 Plaintiff seeks is actually more  
 6 persuasive—as it algins better with the language of the Agreement. (ECF No. 47 at 8-  
 7 10.) As described *supra*, the liquidated damages clause of the Agreement makes a  
 8 number of different actions or omissions a breach—well beyond mere sales—and then  
 9 multiplies liability for those breaches by product, and by day of breach. (ECF No. 47-1 at  
 10 3, § 11.) Given Defendant's myriad breaches of the Agreement, his interpretation of the  
 11 liquidated damages clause matches the plain language of the Agreement.

12 This finding does not mean the Agreement is ambiguous. Quite to the contrary. It  
 13 is instead unambiguous that the liquidated damages clause was intended as a penalty. It  
 14 seeks to impose massive liability for breaching the contract—evidencing its intent to  
 15 secure compliance. See *Mason*, 865 P.2d at 335 (explaining that a liquidated damages  
 16 clause constitutes a penalty, and is thus unenforceable, when its purpose is to secure  
 17 compliance and not reasonably estimate damages). Moreover, the damages Plaintiff  
 18 could recover under the liquidated damages clause as written are entirely untethered  
 19 from, and greatly exceed, actual damages. See *Am. Fire & Safety, Inc. v. City of N. Las*  
 20 *Vegas*, 849 P.2d 352, 355 (Nev. 1993) (“[a] penalty is a sum named, which is  
 21 disproportionate to the damage which could have been anticipated from breach of the  
 22 contract”) (citing 5 *Williston on Contracts* § 776). This case is a good example, where  
 23 Defendant argues he only made some \$25,000 in profit reselling Plaintiff's products  
 24 (ECF No. 47 at 8), and Plaintiff argues Defendant made some \$87,000 in revenue (ECF  
 25 No. 43 at 7). Both amounts are significantly lower than both the amount Defendant

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27                   <sup>6</sup>At first blush, because he is asking to be held significantly more liable than  
 Plaintiffs asked for him to be. But this strategy is merely an effective rhetorical device.  
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1 persuasively argues he should be required to pay if Plaintiff enforced the liquidated  
 2 damage as written, and even the amount Plaintiff seeks. See *Khan*, 306 P.3d at 414  
 3 (invalidating liquidated damages clause when, by its terms, it sought 150% of actual  
 4 damages). In sum, the liquidated damages clause is unenforceable because it was  
 5 intended as a penalty.

6 And while the Court does not condone Defendant's wanton disregard for the  
 7 Agreement, and appreciates Plaintiff's restraint in not seeking the overwhelming  
 8 damages it could seek against Defendant under the liquidated damages clause, the  
 9 Court's findings here are actually informed by a different set of considerations. That is  
 10 Nevada's prohibition on 'blue penciling,' or re-writing unenforceable contract provisions  
 11 to make them enforceable. See *Golden Rd. Motor Inn, Inc. v. Islam*, 376 P.3d 151, 156  
 12 (Nev. 2016) (invalidating overbroad noncompete provision in employment contract, and  
 13 also stating the general principle that, "[r]ightfully, we have long refrained from reforming  
 14 or 'blue penciling' private parties' contracts.") (footnote omitted).<sup>7</sup> As explained *supra*,  
 15 Plaintiff's proposed interpretation of the liquidated damages clause does just that. By  
 16 narrowing the definition of breach to only unauthorized sales to arrive at a damages  
 17 amount closer to actual damages, Plaintiff's approach attempts to reform the liquidated  
 18 damages clause to make it enforceable—which the Court cannot do.

19 In addition, the Court agrees with Defendant that liquidated damages clauses  
 20 should be interpreted based on their effect, not based on disclaimer language added by  
 21 the drafter stating the liquidated damages clause is not a penalty. (ECF No. 47 at 12.) If  
 22 the converse were true, parties would—as Plaintiff did here (ECF No. 47-1 at 3)—include  
 23 language explaining why their liquidated damages provision was not a penalty, and thus

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24       <sup>7</sup>In *Golden Road*, the Nevada Supreme Court explained this doctrine is supported  
 25 by public policy considerations. See 376 P.3d at 156. The *Golden Road* court specifically  
 26 explained that allowing blue-pencilling would virtually allow a court to write a new  
 27 contract for the parties, which impermissibly tramples on the contracting parties' intent.  
 28 See *id.* at 157. The prohibition on blue-pencilling also preserves judicial resources (see  
*id.* at 157-58), and protects less sophisticated parties who may comply with a particularly  
 punitive or onerous contractual term simply because they are unaware the clause is  
 unenforceable (see *id.* at 157).

1 be free to impose punitive liquidated damages clauses on counterparties to their  
2 agreements. Plaintiff's approach of relying on disclaimer language in a liquidated  
3 damages clause (ECF No. 43 at 11, 51 at 7-8) would also render the analysis as to  
4 whether the liquidated damages clause constituted a penalty unnecessary. But, again as  
5 discussed *supra*, Nevada law is clear that is the analysis the Court must undertake.  
6 Thus, the Court accords no weight to the disclaimer language in the Agreement's  
7 liquidated damages clause.

8 Plaintiff also argues that the Court should not find for Defendant here because  
9 Plaintiff has presented evidence, and Defendant has presented none. (ECF No. 51 at 1,  
10 3-6, 8.) But the applicable standard does not require Defendant to present any evidence.  
11 See, e.g., *Mason*, 865 P.2d at 335 ("In order to prove that such a provision constitutes a  
12 penalty, the challenging party must persuade the court that the liquidated damages are  
13 disproportionate to the actual damages sustained by the injured party."). Defendant is  
14 merely required to persuade the Court. And here, Defendant has persuaded the Court  
15 the liquidated damages clause of the Agreement constitutes a penalty. The liquidated  
16 damages clause is therefore unenforceable.

17 Because the liquidated damages clause is unenforceable, Plaintiff has not  
18 satisfied its initial burden to make out a *prima facie* breach of contract claim. See, e.g.,  
19 *Brown*, 531 F. Supp. 2d at 1240 (stating that damages are an element of a breach of  
20 contract claim). The Court must therefore deny Plaintiff's Motion.

21 **V. CONCLUSION**

22 The Court notes that the parties made several arguments and cited to several  
23 cases not discussed above. The Court has reviewed these arguments and cases and  
24 determines that they do not warrant discussion as they do not affect the outcome of the  
25 Motion before the Court.

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1 It is therefore ordered that Defendant's motion for summary judgment (ECF No.  
2 43) is denied.

3 DATED THIS 10<sup>th</sup> day of June 2020.

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7 MIRANDA M. DU  
8 CHIEF UNITED STATES DISTRICT JUDGE  
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